UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
	:	
LEROY HARRIS,	:	05-12216-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
DEBTOR.	:	BANKRUPTCY CODE

O R D E R

Before the Court is the Motion to Annul Stay, or, in the Alternative, for Relief from the Stay, filed by Washington Mutual Bank, FA (hereinafter "Movant"). The Motion is opposed by Leroy Harris (hereinafter the "Debtor"), the debtor in the above-captioned bankruptcy proceeding. On July 28, 2005, the Court held a hearing on the Motion and subsequently took the matter under advisement. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. §§ 157(b)(2)(G); § 1334.

BACKGROUND

On July 2, 2004, the Debtor filed a voluntary bankruptcy petition under Chapter 13 of the Bankruptcy Code (Case Number 04-12046). On September 23, 2004, the Court confirmed the Debtor's proposed Chapter 13 plan, which provided for payments of $360 per month and a 100% dividend to unsecured creditors. Movant filed proof of a secured claim in the amount of $102,834.16, which indicated a pre-petition arrearage of

$6,059.01. Movant's claim purported to be secured by a deed to secure debt on real property known as 125 Bonnie's Way, Jenkinsville, Georgia (hereinafter the "Property"). On December 7, 2004, the Chapter 13 Trustee filed a certificate of non-compliance, indicating that the Debtor had defaulted on his plan payments and had failed to pay the amount of $1,080. In accordance with the order confirming the Debtor's plan, the Court dismissed the Debtor's case on December 8, 2004. The Debtor filed a second[1] Chapter 13 case on January 31, 2005 (Case Number 05-10369). The Debtor's proposed Chapter 13 plan again required a $360 per month payment, which produced only a 10% dividend to unsecured creditors. On March 23, 2004, the Chapter 13 Trustee objected to the confirmation of the Debtor proposed plan because the Debtor failed to attend the first meeting of creditors, as required by section 341, and asserted that the Debtor's case may have been filed in bad faith, citing the Debtor's previous failed cases. The Trustee moved for the dismissal of the case pursuant to section 109(g)(1). On April 11, 2005, the Trustee again objected to confirmation on the basis that the Debtor's plan payments were not current.

On April 14, 2005, Movant filed a motion for relief from the automatic stay, asserting that the Debtor had defaulted on post-petition payments due on the debt secured

[1] According to the Court's electronic docket, the second Chapter 13 case filed was actually the Debtor's fourth case, as the Debtor filed a Chapter 13 case in 1993 (Case Number 93-74241), which was dismissed after confirmation, and a Chapter 7 case in 1998 (Case Number 98-62273), which was discharged on May 18, 1998.

by the Property. Movant requested relief from the stay to permit Movant to proceed with a foreclosure sale of the Property. On April 24, 2005, notice was docketed that the Debtor had obtained a reset date for the first meeting of creditors to be held on June 16, 2005. However, the Debtor filed notice of a voluntary dismissal of the case on May 13, 2005, and, on May 16, 2005, the Court entered an order confirming the dismissal of the case.

The Debtor filed the instant Chapter 13 case on July 1, 2005, along with a proposed plan that provided for a $400 per month plan payment and a 10% dividend to unsecured creditors. On July 5, 2005, Movant filed the instant motion and sought an expedited hearing on the basis that Movant had scheduled a foreclosure sale for July 5, 2005. Movant alleged that: 1) the Debtor had filed his first bankruptcy petition immediately prior to Movant's scheduled foreclosure sale in July 2004, his second bankruptcy petition immediately prior to Movant's scheduled foreclosure sale in February 2005, and his third bankruptcy case immediately prior to Movant's scheduled foreclosure sale in July 2005; and 2) that the Debtor had voluntarily dismissed his second bankruptcy case following the filing of a motion for relief and, therefore, was ineligible to be a debtor for 180 days. Based on these allegations the Court determined that sufficient grounds existed to conclude that the Debtor was not eligible to be a debtor and that he may not have filed his third case in good faith and, accordingly, the Court concluded that the Movant should be permitted to cry the foreclosure sale. The Court entered an interim

order modifying the automatic stay to permit the sale, but not the recording of the deed, and scheduled a final hearing on Movant's requested relief for July 28, 2005.

At the hearing on July 28, 2005, Movant argued that the stay should be further lifted to permit Movant to record the deed because the Debtor is ineligible to be a debtor under section 109(g)(2). Consequently, if the Debtor is not eligible to be a debtor, his case must be dismissed and no purpose would be served in allowing the stay to remain in place if the Debtor cannot propose a confirmable plan and cure the arrearage. Additionally, Movant pointed to the Debtor's filing history as evidence of the Debtor's bad faith and inability to confirm a plan. Movant further highlighted the fact that the Debtor is now in arrears for 17 months worth of payments, which would be difficult, if not impossible to cure through a Chapter 13 plan. In response, the Debtor argued that section 109(g)(2) should not be applied to the Debtor because he dismissed his second case only because he was going through financial problems and could not make his payments, but that his financial condition has now changed because he has been reconciled with his wife and now has stable employment and the means to fund his plan.

CONCLUSIONS OF LAW

Section 109(g) provides that "no individual . . . may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if – . . . (2) the debtor requested and obtained the voluntary dismissal of the case

following the filing of a request for relief from the automatic stay provided by section 362." 11 U.S.C. § 109(g). "There has been a split of authority in bankruptcy cases interpreting §§ 109(g)(2) based on whether a good faith standard should be written into the statutory language . . . , or whether such a good faith standard is simply not permitted and the mechanical 180 day rule must be applied without regard to the reasons for the dismissal." *Tooke v. Sunshine Trust Mortgage Trust*, 149 B.R. 687, 690 (M.D. Fla. 1992).

One line of cases holds that the language of section 109(g)(2) is not ambiguous and must be applied as written without any consideration as to whether the debtor's dismissal of the bankruptcy case was an attempt to frustrate or delay creditors' rights. *See In re Andersson*, 209 B.R. 76 (Bankr. 6th Cir. 1997); *see also Kuo v. Walton*, 167 B.R. 677 (M.D. Fla. 1994) (holding that application of section 109(g)(2) is mandatory and the lack of ambiguity in the statutory language prevents the court from considering the debtor's motives); *In re Jarboe*, 177 B.R. 242 (Bankr. D. Md 1995) (holding that the court had no discretion as to whether to apply section 109(g)(2), even though the motion for relief had been filed in error and withdrawn). These courts reason that lower courts should presume that Congress "says in a statute what it means and means in a statute what it says" and, when a statute is not ambiguous, the interpretation must begin and end with the text. *See In re Richardson*, 217 B.R. 479, 482 (Bankr. M.D. La. 1998) (citing *In re Andersson*, 209 B.R. 76 (Bankr. 6th Cir. 1997)).

Other courts agree that the language is not ambiguous, but refuse to mechanically apply the statute because to do so would produce absurd or unjust results. *In re Hutchins*, 303 B.R. 503 (Bankr. N.D. Ala. 2003) (holding that, although the language of the statute is unambiguous, strict application would lead to an absurd result where the debtor had been performing well in a 100% Chapter 13 plan and had made a good faith effort to pay her mortgages); *In re Luna*, 122 B.R. 575 (Bankr. 9th Cir. 1991) (holding that application of section 109(g)(2) is not mandatory where application would produce an illogical and unjust result); *In re Santana*, 110 B.R. 819 (Bankr. W.D. Mich. 1990) (refusing to apply section 109(g) if the purpose of the statute would not be served by its application).

Additionally, courts have differed in their interpretations of the word "following." *See In re Richardson*, 217 B.R. 479 (Bankr. M.D. La. 1998) (review of cases differing in the interpretation and application of § 109(g)(2)). Some courts have assumed or decided that the word should be given its primary meaning, which they have concluded is "after." *See In re Richardson*, 217 B.R. 479 (Bankr. M.D. La. 1998); *In re Munkwitz*, 235 B.R. 766 (E.D. Pa. 1999). Other courts have acknowledged that the word can also be used to convey that one act is done as the result of another and have concluded that the use of the word "following," instead of after, indicates that Congress intended a showing of "some relationship between the motion for relief from stay and the voluntary dismissal." *In re Duncan*, 182 B.R. 156 (Bankr. W.D. Va. 1995) ("This interpretation seems the most obvious and natural meaning when one considers that Congress' intent

in adding section 109(g) to the Bankruptcy Code was to remedy the abusive practice of serial bankruptcy filings."). Under this interpretation, courts will consider the debtor's reason for dismissing the bankruptcy case to determine whether the dismissal was motivated by the filing of the motion for relief. If the dismissal was not related to or in response to the motion for relief, these courts conclude that the purpose of section 109(g) – preventing abusive multiple filings – would not be served by prohibiting the debtor from refiling.

Finally, in a third line of cases, the outcome is determined by an analysis of whether the motion for relief from stay remains pending at the time the debtor requests and obtains the voluntary dismissal. *See In re Jones*, 99 B.R. 412 (Bankr. E.D. Ark. 1989); *In re Milton*, 82 B.R. 637 (Bankr. S.D. Ga. 1988). In these cases, the courts reason that, if the motion for relief has been withdrawn, granted, denied, or otherwise resolved, the motion is no longer before the court and, accordingly, cannot be followed by the debtor's voluntary dismissal. *See In re Richardson*, 217 B.R. at 484.

This Court is inclined to agree with the line of cases holding that the plain meaning of section 109(g)(2) does not allow the Court to consider the Debtor's reasons for dismissing the case. To determine the proper application of section 109(g)(2), the Court must begin by considering the text of the statute. *See Patterson v. Shumate*, 504 U.S. 753, 757 (1992); *In re Paschen*, 296 F.3d 1203 (11th Cir. 2002) ("In construing a statute we must begin, and often should end as well, with the language of the statute

itself."); *In re Yates Development, Inc*., 256 F.3d 1285, 1288-89 (11th Cir. 2001) ("The plain meaning canon of statutory construction applies with equal force when interpreting the Bankruptcy Code."). "'[T]he duty of interpretation does not arise' for a statute when the plain language of the statute admits to only one meaning.'" *In re Cox*, 338 F.3d 1238 (11th Cir. 2003) (quoting *Caminetti v. United States,* 242 U.S. 470 (1917)). "Where the language of a statute is plain, we will not look at legislative history, even if that legislative history evinces a contrary intent." *Yates Development, Inc*., 256 F.3d at 1289.

Here, the text of the statute is clear and contains nothing to indicate that a bankruptcy court can, in its discretion, determine whether to apply section 109(g)(2) based upon the equities of the situation. Additionally, the statute contains no language that indicates that Congress intended section 109(g)(2) to apply only when the debtor requested the dismissal of the first case in response to the motion for relief. *See In re Stuart*, 297 B.R. 665 (Bankr. S.D. Ga. 2003) ("I conclude from the language of § 109(g)(2), in conjunction with guidance from binding case law set out above, that Congress intended to make debtors who dismiss and refile in the face of a motion for relief ineligible, regardless of their subjective state of mind or intent, and did not intend for a bankruptcy court to condition section 109(g)(2)'s application upon a judicial determination regarding a debtor's intent."); *In re Munkwitz*, 235 B.R. 766, 769 (E.D. Pa. 1999) ("Though this approach may be over-inclusive--covering abuses that Congress was trying to prevent as well as cases where no abuse is evident--a blanket rule to curb

potential abuse of the Bankruptcy Code is sensible.").

This Court recognizes that courts have disagreed over the meaning of the word "following." While the majority of courts have assumed the word to mean "after," a few courts have held that the word means "because of" or "in response to." As the word "following" is not expressly defined by the Bankruptcy Code, the Court must first "look to the common usage of [the word] for [its] meaning." *Consolidated Bank, N.A. v. United States Dep't of Treasury*, 118 F.3d 1461, 1464 (11th Cir.1997); *see also In re Fretz*, 244 F.3d 1323 (11th Cir. 2001). Both definitions are recognized by standard sources. *See* WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1994) (defining "follow" as "1. To come or go after,. . . 5. To be the result of . . . ," and "7. To come after in order, time, or position . . ."). However, the Court must concur with the *Richardson* court, as well as those courts which, in deciding that the statute is not ambiguous, have implicitly held that the ordinary meaning of the word "following" is to come after in time. *See In re Richardson*, 217 B.R. 479 (Bankr. M.D. La. 1998).

As recognized by the *Richardson* court, both definitions of the word are supported by language authorities. To eradicate all question as to its intended meaning, Congress could have chosen the word "after" or the words "because of," "on account of," or "in response to." However, it is more common for the word "following" to be used interchangeably with the word "after," than with the words "because of," "account of," or "in response to." In fact, Congress has exhibited a pattern of such use within the

Bankruptcy Code. In all other instances in which Congress has used the word "following" in the Bankruptcy Code, the meaning is clearly intended to be "after in time" or "next." In three instances, Congress chose the word to determine a chronological date upon which or from which something must be determined or measured. *See* 11 U.S.C. § 502(b)(6) ("the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, *following* the earlier of . . . the date of the filing of the petition; and . . . the date on which such lessor repossessed, or the lessee surrendered, the leased property;"); § 502(b)(7) ("the compensation provided by such contract, without acceleration, for one year *following* the earlier of . . . the date of the filing of the petition; or . . . the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract;"); § 1145(a)(3)(C) ("such offer or sale is of securities that do not exceed– during the two-year period immediately *following* the date of the filing of the petition, four percent of the securities of such class outstanding on such date; and . . . during any 180-day period *following* such two-year period, one percent of the securities outstanding at the beginning of such 180-day period;"). In the remainder of the provisions in which Congress used the word "following," it clearly heralds the enumeration of multiple items.[2] The Court has uncovered no other examples of a

[2] *See* 11 U.S.C. § 106(a) ("with respect to the following"); § 507 ("the following expenses and claims have priority in the following order:"); § 522(d) ("the following property"); § 541(a) ("the following property"); § 726(c)(2) ("in the following order and

provision of the Code in which the word "following" was used to indicate that one event was triggered or caused by another event. For these reasons, as well as the Court's own sense of the common usage of the word, the Court is inclined to hold that the statute requires consideration of whether the debtor requested and obtained the dismissal of a case after a motion for relief has been filed and does not require an analysis of the debtor's motivation for requesting such dismissal.

That being said, the Court finds that it need not choose between the varying interpretations of the word "following" to resolve the matter before it. Whether the Court holds that section 109(g)(2) is applicable whenever a debtor dismisses a case "after" a motion for relief is filed, or whether the Court holds that "following" means "because of" or "as a consequence of," the Court must conclude that the Debtor would satisfy either of these interpretations. The Debtor clearly dismissed his case "after" Movant filed its motion for relief. Additionally, although the Debtor claims that he dismissed his case because he could not make his plan payments, the Court cannot conclude that the filing of the motion for relief had nothing to do with the Debtor's decision to dismiss the case. Given the Debtor's history of refiling petitions on the eve of scheduled foreclosure sales, the Court is persuaded that the Debtor dismissed the case with the intent of avoiding the

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manner:"); § 781 ("the following definitions shall apply"); § 1129(a) ("the court shall confirm a plan only if all of the following requirements are met"); § 1129(b)(2) ("includes the following requirements:").

entry of an order lifting the stay and refiling prior to the next scheduled foreclosure sale.

As to those line of cases that hold that a strict application of section 109(g)(2) would create an absurd result, the Court need not accept or reject these cases, as under any of these, application of section 109(g)(2) to the Debtor's case would not create an absurd result. "In interpreting a Bankruptcy Code section, we turn to the natural meaning of the terms employed therein except in the rare circumstance where to do so would produce an absurd result." *In re Welzel*, 275 F.3d 1308 (11th Cir. 2001). Presumably, a result is not absurd if it comports with the intent of the statute. The limited legislative history available indicates that Congress enacted section 109(g)(2) to "provide courts with greater authority to control abusive multiple filings." *See* S. Rep. No. 65, 98th Cong. 1st Sess. 74 (1983). From the language of the statute and the legislative history, most courts have concluded that the statute was designed to prevent debtors from continually avoiding a creditor's attempts to foreclose by filing petitions on the eve of foreclosure, dismissing the case once the creditor has moved for relief from the stay, and refiling the case to gain the protection of a new automatic stay. *See In re Andersson*, 209 B.R. 76, 79 (Bankr. 6th Cir. 1997) (section 109(g)(2) was intended to prevent "the debtor from controlling the automatic stay without restriction by voluntarily invoking the stay (filing) and voluntarily terminating the stay (dismissing)"). No court has argued that a strict application of section 109(g)(2) in every case fails to achieve this purpose. However, in the cases in which the literal application of the statute would go beyond this

purpose, courts have held that the mechanical application of section 109(g)(2) should be avoided because it produces unjust and absurd results. *See In re Santana*, 110 B.R. 819 (Bankr. W.D. Mich. 1990) ("Thus although the statute is unambiguous, to apply it literally to the facts now before me in my opinion would produce, if not an absurd result, then certainly one which goes far beyond the scope of the abuse which it appears Congress was attempting to cure.").

In certain cases, a strict application of section 109(g)(2) effectively prevents even multiple filings that are not abusive. There are many scenarios in which the facts fit squarely within the confines of section 109(g)(2), but the circumstances clearly indicate that the debtor was not trying to abuse the bankruptcy process. For instance, if a creditor files a motion for relief early in a Chapter 13 case, even if that motion is resolved, under a literal application, any subsequent voluntary dismissal of the case would bar a re-filing for 180 days. Several dispositions of the motion for relief could result. First, if the creditor succeeds and is allowed to foreclose, after which the debtor voluntarily dismisses the case, the debtor would be barred from filing a new petition, even if she had a change in her financial condition that affected her need to seek relief under Chapter 7.[3] In that case, there would no longer be any need to protect the foreclosing creditor from a second filing, and it is hard to characterize the debtor's dismissal and attempt to refile as an

[3] If the motion for relief is granted and the debtor voluntarily dismisses and refiles before the creditor forecloses, it is not difficult to conclude that the debtor is attempting to frustrate the creditor's attempt to foreclose.

abusive filing. Second, if the motion is withdrawn or denied, the debtor has successfully fended off the creditor's attempt to foreclose and would have no reason to voluntarily dismiss the case, other than a reason that is unrelated to the motion for relief.[4] Nonetheless, the debtor's request to dismiss followed the filing of the motion for relief, and, under a strict application of the statute, would be a bar to refiling. Finally, there may be other cases in which the facts clearly suggest that the debtor was not trying to frustrate creditors' rights, but had other reasons for voluntarily dismissing the case. For example, the debtor may have been unaware of the filing of the motion for relief, in which case one could assume that the debtor's voluntary dismissal was not motivated by the creditor's attempt to have the stay lifted and was therefore not abusive.[5]

In addition to reaching more cases than intended by Congress, it is at least arguable that a strict application of the statute will, in some cases, conflict with other fundamental policies of the Bankruptcy Code. First, most courts have recognized that Congress intends for bankruptcy relief, at least in the form of a liquidation, to be widely

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[4] Courts following the "pending" approach described above would conclude in such a case that there is no longer any motion for relief pending and, accordingly, the debtor's request for dismissal cannot follow the motion. However, as noted by the *Richardson* court, this interpretation of the statute seems to ignore the fact that the triggering event in the statute is the "the filing of a motion for relief" as opposed to the motion itself. *See In re Richardson*, 217 B.R. at 484.

[5] In *In re Stuart*, the bankruptcy court noted that, in this situation, section 109(g) should not be applied. Doing so would deprive the debtor of due process because the debtor lacked notice of the fact that a motion for relief had been filed. *In re Stuart*, 297 B.R. 665 (Bankr. S.D. Ga. 2003).

available to all natural persons. Interpreting section 109(g)(2) narrowly to apply only to those debtors who have exhibited an intent to abuse the system is more consistent with this policy, as it more precisely effectuates Congressional intent to curb abusive, repetitive filings without unnecessarily limiting access to bankruptcy relief. Giving the statutory language its broadest interpretation may prohibit "honest, but unfortunate debtors" from accessing bankruptcy protection for a full six months. Additionally, it has long been noted that the automatic stay protects not only the debtor, but also the creditors of the debtor. The automatic stay is often considered to be crucial to fulfilling the policy of equal treatment of creditors. While a debtor is ineligible for relief, the creditors cannot benefit from the protections of the stay, even by exercising their statutory right to place the debtor into an involuntary bankruptcy proceeding. *See* 11 U.S.C. § 109(g) ("no individual . . . may be a debtor under this title"); *In re Corto,* 1995 WL 643372, *5 (W.D.N.Y. Oct. 18, 1995).

Regardless of whether a strict application may cause absurd results under the fact scenarios discussed above, the Court does not have such a fact scenario before it in this case. Accordingly, the Court will not reach the issue of whether, under other circumstances, the Court could conclude that application of section 109(g)(2) would in fact create an absurd result. Here, the Debtor has had several opportunities to proceed under the protection of the Bankruptcy Code. The Debtor failed to prosecute his first two cases and, in the process, has held Movant at bay for quite some time. Faced with the

filing of a motion for relief on the one hand, and the likelihood that the Chapter 13 Trustee would seek dismissal under section 109(g)(1) on the other, the Debtor chose to voluntarily dismiss his case. The Debtor is deemed to have known the consequences of his actions. In this case, the statute mandates that the Debtor is barred from filing another case for 180 days. Accordingly, he is ineligible to be a debtor, and the instant case is due to be dismissed.

The question of whether a stay ever existed in this case in the first instance is not settled law. *Compare In re McKay*, 268 B.R. 908, 912 (W.D. Va. 2001) ("Only a person qualified under § 109 can commence a voluntary bankruptcy case that will invoke the automatic stay."), *with, In re Flores,* 291 B.R. 260, 262 (Bankr. S.D.N.Y. 2003) (a petition filed in violation of section 109(g) is a petition that commences a case and gives rise to an automatic stay). If no stay existed, Movant need not have moved for relief from the stay to cry the sale or to seek permission to record the deed. However, having moved for such relief, the Court finds no reason why the stay, if any exists, should not be modified to permit Movant to record its deed. The Debtor is ineligible to be a debtor; his case will be dismissed; and the Debtor will have no means of curing the arrearage on the mortgage debt under the protection of the Bankruptcy Court. Accordingly, the Court will grant Movant's motion for relief.

CONCLUSION

For the reasons stated above, the Motion for Relief filed by Washington Mutual Bank, FA is hereby **GRANTED**.

IT IS FURTHER ORDERED that the instant case is hereby **DISMISSED**.

IT IS SO ORDERED.

At Newnan, Georgia, this _____ day of July, 2005.

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W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE